> [N]either a treaty nor an executive agreement will be considered "'abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.'" *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)); *see Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 936–37 (D.C. Cir. 1988). The way Congress expresses itself is through legislation.
>
> Executive agreements are essentially contracts between nations, and like contracts between individuals, executive agreements are expected to be honored by the parties. Congress (or the President acting alone) may abrogate an executive agreement, but legislation must be clear to ensure that Congress—and the President—have considered the consequences. The "requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). *Roeder I*, 333 F.3d at 237–38.[5]

The court then examined whether the 2008 amendments to the FSIA satisfied this standard, concluding that they did not.

> Roeder argues that the 2008 FSIA amendments, by creating a federal cause of action against state sponsors of terrorism, rendered our country's commitment to bar claims like Roeder's a nullity. As the district court pointed out, during the five years between *Roeder I* and the 2008 amendments, in the 107th, 108th, 109th, and 110th sessions of Congress, legislators tried—and failed—"to enact legislation that would explicitly abrogate the provision of the Algiers Accords barring the hostages' suit." *Roeder v. Islamic Republic of Iran*, 742 F.Supp.2d 1, 5 (D.D.C. 2010) . . . . Just as in *Roeder I*, the amendments that finally passed "do not, on their face, say anything about the Accords."[6]

Based on a detailed analysis of the interaction of the complex statutory texts, the court concluded that the 2008 amendments to the FSIA did not sufficiently demonstrate congressional intent to abrogate the Algiers Accord.

> We do not deny the force of Roeder's argument. In the end it may well represent the best reading of §1083(c)(3). But our focus is not on the best reading. Legislation abrogating international agreements "must be clear to ensure that Congress—and the President—have considered the consequences." *Roeder I*, 333 F.3d at 238. An ambiguous statute cannot supercede an international agreement if an alternative reading is fairly possible. *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006). This clear statement requirement—common in other areas of federal law, see *Roeder I*, 333 F.3d at 238—"assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).[7]

Tenth Circuit Upholds Injunction Barring Oklahoma Anti-Sharia, Anti-international Law Constitutional Amendment

In January 2012, the U.S. Court of Appeals for the Tenth Circuit unanimously upheld a district court injunction[1] barring Oklahoma's State Election Board from certifying an amendment to Oklahoma's constitution, designated by the state legislature as the "Save Our State"

[5] *Id.* at 58 n.2 (parallel citations omitted).

[6] *Id.* at 59–60.

[7] *Id.* at 61 (parallel citations omitted).

[1] Awad v. Ziriax, 754 F.Supp.2d 1298, 1308 (W.D. Okla. 2010).

amendment.[2] If brought into force, the amendment would direct that Oklahoma courts "shall *not look to* the legal precepts of other nations or cultures. Specifically, the courts *shall not consider international law or Sharia Law.*"[3]

The Oklahoma attorney general's explanation of the proposed amendment on the ballot stated:

> This measure amends the State Constitution. . . . It makes courts rely on federal and state law when deciding cases. It forbids courts from considering or using international law. *It forbids courts from considering or using Sharia Law.*
>
> International law is also known as the law of nations. It deals with the conduct of international organizations and independent nations, such as countries, states and tribes. It deals with their relationship with each other. It also deals with some of their relationships with persons.
>
> The law of nations is formed by the general assent of civilized nations. Sources of international law also include international agreements, as well as treaties.
>
> *Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teachings of Mohammed.*[4]

The amendment was approved by over 70 percent of Oklahoma voters in a November 2010 referendum.[5] The court of appeals found that it improperly singled out a single religion, Islam, for adverse treatment contrary to the Establishment Clause of the U.S. Constitution, so that the district court did not abuse its discretion in enjoining the Board from certifying it.[6] The court of appeals' decision to uphold the lower court's injunction does not end the case, which will now continue on the merits.

The court initially addressed whether the plaintiff, Muneer Awad, an Oklahoma citizen and executive director of the Oklahoma Council on American-Islamic Relations, sustained injury sufficient to render justiciable his claims that the amendment violated the Establishment Clause. Oklahoma claimed they were not, arguing first that Awad had not suffered any actual or imminent injury. "[B]ecause the amendment has not taken effect or been interpreted by any Oklahoma court, Mr. Awad's alleged injuries are necessarily speculative."[7] The state further contended that Awad's assertion that he will suffer official condemnation of his religion is "personal opinion."[8] The court did not agree.

> Mr. Awad suffers a form of "personal and unwelcome contact" with an amendment to the Oklahoma Constitution that would target his religion for disfavored treatment. As a Muslim and citizen of Oklahoma, Mr. Awad is "directly affected by the law[] . . . against which [his] complaints are directed.". . .

[2] Awad v. Ziriax, No. 10-6273, 2012 U.S. App. LEXIS 475, 670 F.3d 1111 (10th Cir. Jan. 10, 2012).

[3] *Id.* at *7–8.

[4] *Id.* at *8–9 (quoting revised ballot title).

[5] John R. Crook, Contemporary Practice of the United States, 104 AJIL 654, 658 (2010); 105 AJIL 122, 123 (2011).

[6] U.S. CONST. amend. I, cl. 1: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

[7] *Awad*, 2012 U.S. App. LEXIS 475, at *14.

[8] *Id.*

> Mr. Awad alleges injuries beyond the "personal and unwelcome contact" that suffices for standing with religious symbols. He alleges that the amendment condemns his religious faith and exposes him to disfavored treatment. . . .
>
> . . . .
>
> . . . In this case, the Oklahoma Legislature did not simply adopt a non-binding resolution opposing the consideration or use of Sharia law in state courts; it proposed and the electorate agreed to enshrine such a prohibition in the state's constitution. Mr. Awad is facing the consequences of a statewide election approving a constitutional measure that would disfavor his religion relative to others. . . . The Oklahoma amendment conveys more than a message; it would impose a constitutional command.
>
> We conclude that Mr. Awad's allegation—that the proposed state amendment *expressly* condemns his religion and exposes him and other Muslims in Oklahoma to disfavored treatment—suffices to establish the kind of direct injury-in-fact necessary to create Establishment Clause standing.
>
> Because the amendment would likely have been certified a week after it was passed, we further conclude that the injury alleged by Mr. Awad is imminent and not conjectural or hypothetical.[9]

The court rejected Oklahoma's further contention that Awad's claims were not ripe.

> Mr. Awad has shown he faces an immediate and concrete condemnation injury if we withhold review and the measure is certified. Mr. Awad thus faces a "direct and immediate dilemma" and has established the necessary hardship to overcome prudential ripeness concerns.[10]

The court then considered the four factors required in U.S. law for the grant of a preliminary injunction, finding that all were satisfied.[11] It first determined that the plaintiff had shown a sufficient likelihood of success on the merits because the amendment targeted only a single faith.

> [T]he Oklahoma amendment specifically names the target of its discrimination. The only religious law mentioned in the amendment is Sharia law, which is defined in SQ 755 in religious terms: "Sharia Law is Islamic law. It is based on two principal sources, the Koran and the teachings of Mohammed." Aplt. App. Vol. 1 at 179.
>
> Appellants argue there is no discrimination because the amendment bans all religious laws from Oklahoma courts and Sharia law is named only as an example. But that argument conflicts with the amendment's plain language, which mentions Sharia law in two places.
>
> . . . .
>
> [T]he amendment states that Oklahoma "courts shall not look to the legal precepts of *other* nations or cultures. Specifically, the courts shall not consider international law or Sharia Law." *Id.* (emphasis added). Appellants argue that the word "cultures" should be read to

[9] *Id.* at *20–24 (citations omitted).

[10] *Id.* at *28.

[11] "To obtain a preliminary injunction, Mr. Awad must show that four factors weigh in his favor: '(1) [he] is substantially likely to succeed on the merits; (2) [he] will suffer irreparable injury if the injunction is denied; (3) [his] threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.'" *Id.* at *28–29.

include religious groups, and that the amendment therefore "plainly prohibits the consideration of legal precepts associated with *all* religious denominations." Aplt. Supp. Br. at 7. We disagree.

The amendment bans only one form of religious law—Sharia law.[12]

The court gave short shrift to Oklahoma's arguments that the amendment served a compelling state interest. "For an interest to be sufficiently compelling to justify a law that discriminates among religions, the interest must address an identified problem that the discrimination seeks to remedy."[13] However,

Appellants provided only one sentence on compelling interest. They simply assert that "Oklahoma certainly has a compelling interest in determining what law is applied in Oklahoma courts." Aplt. Supp. Br. at 16.

Oklahoma's asserted interest is a valid state concern. But this general statement alone is not sufficient to establish a *compelling* interest for purposes of this case. Appellants do not identify any *actual problem* the challenged amendment seeks to solve. Indeed, they admitted at the preliminary injunction hearing that they did not know of even a single instance where an Oklahoma court had applied Sharia law or used the legal precepts of other nations or cultures, let alone that such applications or uses had resulted in concrete problems in Oklahoma.

Given the lack of evidence of any concrete problem, any harm Appellants seek to remedy with the proposed amendment is speculative at best and cannot support a compelling interest.[14]

The court also found that the plaintiff had made a strong showing that his threatened injury outweighed any injury to Oklahoma resulting from the injunction.

Appellants argue that the balance weighs in their favor because Oklahoma voters have a strong interest in having their politically expressed will enacted, a will manifested by a large margin at the polls. But when the law that voters wish to enact is likely unconstitutional, their interests do not outweigh Mr. Awad's in having his constitutional rights protected. *See Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 699 (9th Cir. 1997).

As the Ninth Circuit explained, when a law that voters have approved "affronts the federal Constitution—the Constitution which the people of the United States themselves ordained and established—the court merely reminds the people that they must govern themselves in accordance with the principles of their choosing."[15]

INTERNATIONAL ORGANIZATIONS

United States Supports Adoption of Reduced UN Budget for 2012–13

In the face of greatly increased pressure on the U.S. foreign affairs budget, the United States vigorously promoted efforts in the UN General Assembly to reduce the size of the UN budget for the 2012–13 biennium. The budget approved by the General Assembly in December 2011

[12] *Id.* at *38–39.
[13] *Id.* at *41.
[14] *Id.* at *42–43 (citations omitted).
[15] *Id.* at *47–48 (citations omitted).

is 5 percent below that of the previous biennium. It provides additional funding for the UN's oversight agency, the Office of Internal Oversight Services, and institutes public coverage of formal meetings of UN committees through webcasting. The General Assembly also asked the International Civil Service Commission to examine limiting pay adjustments for UN staff when U.S. federal civil service pay is frozen.[1] A fact sheet on the budget and other management actions prepared by the U.S. Mission to the United Nations follows:

> The United States is proud to have negotiated, alongside our international partners, a strengthened, more efficient, and more effective United Nations budget that saves the American taxpayers millions of dollars and sets the United Nations on the path of real fiscal discipline and continued reform. Highlights of the 2012–2013 biennium budget include:
>
> • *A 5% overall cut in the size of the UN budget.* The total budget of $5.153 billion represents the first time in 14 years—and only the second time in the last 50 years—that the General Assembly has approved a regular budget level below the previous biennia's final appropriation ($5.41 billion in 2010–2011). When factoring in the difference between the likely budget level based on historic patterns and the budget approved last week, this budget represents a savings to American taxpayers of as much as $100 million.
>
> • *Introduced the concept of administrative pay freezes to the UN system.* Previously, salaries for UN professional staff—though based on those for U.S. federal employees—were adjusted on the basis of changes in cost of living in individual duty stations, regardless of whether a pay freeze was in effect for U.S. federal employees. This meant that there was no way, aside from staffing reductions, to check the growth of personnel costs in any of the UN system organizations. In most of these organizations, personnel costs represent both the largest share of the budget and the largest driver of budget growth. As a result of provisions in the UN common system resolution adopted on Christmas Eve, the International Civil Service Commission is now tasked with finding ways to reflect pay freezes for U.S. federal employees, including the statutory pay freeze in effect through next year, within the UN salary system for professional staff system-wide.
>
> • *Initiated a process to address "recosting" implications.* Took the first step toward reforming the "recosting" process that, in part, has had the effect of eroding budget discipline. Recosting, which allows the UN to seek additional funding for exchange rate variances, inflation, and other variances, has led to Member States receiving an additional bill even after the initial budget is passed. In the past, there have been no corresponding decreases in other parts of the budget to cover these costs. Most of the expected "recosting" bill for this biennium has been deferred until later in the biennium in order to assess what is really needed and give the Secretary General the opportunity to find further savings, which he has pledged to do, to offset any recosting increase that may be required later.
>
> • *Advanced UN transparency efforts.* Instituted public coverage of all UN Committee formal meetings through webcasting and secured a pledge by Member States to consider in March 2012 a proposal by the Office of Internal Oversight Services to publish their internal audit reports publicly.
>
> • *Strengthened the UN's oversight and accountability capabilities.* Approved a senior-level post (Assistant-Secretary General) in the Office of Internal Oversight Services to ensure

[1] U.S. Mission to the United Nations Press Release No. 2011/322, Statement by Ambassador Joseph M. Torsella, U.S. Representative to the United Nations for UN Management and Reform, on the Adoption by the General Assembly of the UN 2012–2013 Regular Budget (Dec. 24, 2011), *at* http://usun.state.gov/briefing/statements/2011/179776.htm.

effective coordination amongst the various divisions of the Office as well direct and manage the Executive Office. . . .

- *Defended the role of the Secretary General.* Maintained the Secretary General's existing authorities to govern the United Nations effectively and protected his prerogative to manage the overall envelope of resources at his disposal despite efforts to condemn proposed reductions by the Secretary General and curtail his authority. Further secured a pledge by the Secretary General to continue to work to bring costs down over the next two years.[2]

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

United States–Mexico Agreement on Development of Transboundary Hydrocarbon Reservoirs in the Gulf of Mexico

In February 2012, the U.S. Department of State announced signature of an agreement between the United States and Mexico on cooperative measures to regulate development of deepwater oil and gas deposits in the area of their international maritime boundary in the Gulf of Mexico. If approved by U.S. and Mexican authorities and brought into force, the agreement will end a moratorium on oil exploration and production in the Western Gap portion of the Gulf. This area runs east from the U.S.-Mexico border to a point over 200 miles south of the mouth of the Mississippi River. It includes deepwater areas with water depths of nearly 11,000 feet.[1]

The agreement will open large areas to deepwater drilling on Mexico's continental shelf by Petróleos Mexicanos (PEMEX) and on the U.S. outer continental shelf by companies licensed by the U.S. Department of the Interior.[2] According to the Department of the Interior,

> As a result of this Agreement, nearly 1.5 million acres of the U.S. Outer Continental Shelf will now be made more accessible for exploration and production activities. Estimates by the Department of Interior's Bureau of Ocean Energy Management (BOEM) indicate this area contains as much as 172 million barrels of oil and 304 billion cubic feet of natural gas.[3]

The agreement establishes a legal framework for U.S. companies to develop offshore projects with PEMEX. It also provides for joint U.S.-Mexican inspection teams to ensure compliance with applicable laws and regulations and for review of development plans by authorities of both countries. Excerpts from a U.S. Department of State press release describing the agreement follow:

[2] U.S. Mission to the United Nations Press Release No. 2011/323, Fact Sheet: Passage of the Fifth Committee Regular Budget for the 2012–2013 Biennium (Dec. 29, 2011), *at* http://usun.state.gov/briefing/statements/2011/179785.htm.

[1] Tom Fowler, *U.S., Mexico Sign Deal on Oil Drilling in Gulf*, WALL ST. J., Feb. 21, 2012, *at* http://online.wsj.com/article/SB10001424052970204131004577235501591753554.html.

[2] John M. Broder & Clifford Krauss, *U.S. in Accord with Mexico on Drilling*, N.Y. TIMES, Feb. 21, 2012, at A4.

[3] U.S. Dep't of the Interior Press Release, Sec. Salazar Joins Mexican President Calderon, Sec. Clinton, Mexican Officials to Announce Agreement Providing Access to Nearly 1.5 Million Acres of the U.S. Outer Continental Shelf (Feb. 20, 2012), *at* http://www.doi.gov/news/pressreleases/Sec-Salazar-Joins-Mexican-President-Calderon-Sec-Clinton-Mexican-Officials-to-Announce-Agreement-Providing-Access-to-Nearly-1-point-5-Million-Acres-of-the-US-Outer-Continental-Shelf.cfm.

The United States and Mexico today signed an agreement concerning the development of oil and gas reservoirs that cross the international maritime boundary between the two countries in the Gulf of Mexico. The Agreement is designed to enhance energy security in North America and support our shared duty to exercise responsible stewardship of the Gulf of Mexico. It is built on a commitment to the safe, efficient, and equitable exploitation of transboundary reservoirs with the highest degree of safety and environmental standards.

Elements of the Agreement

- The United States and Mexico jointly announced their intention to negotiate a transboundary hydrocarbons agreement on June 23, 2010, following the Joint Statement adopted by Presidents Obama and Calderon at the conclusion of President Calderon's State Visit to Washington on May 19, 2010.
- Upon entry into force, the current moratorium on oil exploration and production in the Western Gap portion of the Gulf of Mexico will end.
- The Agreement establishes a cooperative process for managing the maritime boundary region that promotes joint utilization of transboundary reservoirs.
- The Agreement provides a legal framework for possible commercial activities at the maritime boundary and sets clear guidelines for transboundary developments. It establishes incentives for oil and gas companies to voluntarily enter into arrangements to jointly develop any transboundary reservoirs. In the event such an arrangement is not achieved, the Agreement establishes a process by which U.S. companies and PEMEX can individually develop the resources on each side of the border while protecting each nation's interests and resources.
- The legal certainty created by the Agreement will enable U.S. companies to explore new business opportunities and carry out collaborative projects with PEMEX.
- The Agreement also provides for joint inspections teams to ensure compliance with applicable laws and regulations. Both governments will review all plans for the development of any transboundary reservoirs.

. . . .

Further Growth in the Bilateral Energy Relationship

- Mexico is consistently one of the top three exporters of petroleum to the United States. It ranked second behind Canada in 2010 with exports to the United States of 1.3 million barrels per day.[4]

The U.S. Department of the Interior press release gives additional details. Excerpts follow:

The Transboundary Agreement establishes a framework for U.S. offshore oil and gas companies and Mexico's Petroleos Mexicanos (PEMEX) to jointly develop transboundary reservoirs. The agreement also opens up resources in the Western Gap that were off limits to both countries under a previous treaty that imposed a moratorium along the boundary through 2014.

. . . .

[4] U.S. Dep't of State Press Release No. 2012/255, U.S.-Mexico Transboundary Hydrocarbons Agreement (Feb. 20, 2012), *at* http://www.state.gov/r/pa/prs/ps/2012/02/184235.htm.

> In May 2010, Presidents Obama and Calderon committed to reaching an agreement to jointly develop reservoirs that were determined to be transboundary. Since that time, representatives from the U.S. Department of State, the U.S. Department of the Interior, and Mexico's Foreign Ministry and Ministry of Energy worked to negotiate an agreement that can be implemented while respecting each nation's legal framework.
>
> The Transboundary Agreement sets clear guidelines for the development of oil and natural gas reservoirs that cross the maritime boundary. Under the Agreement U.S. companies and PEMEX will be able to voluntarily enter into agreements to jointly develop those reservoirs. In the event that consensus cannot be reached, the Transboundary Agreement establishes the process through which U.S. companies and PEMEX can individually develop the resources on each side of the border while protecting each nation's interests and resources.
>
> The Transboundary Agreement also provides for joint inspection teams from the Bureau of Safety and Environmental Enforcement and the Mexican Government to ensure compliance with applicable laws and regulations. Relevant agencies on both sides of the boundary will review all plans for the development of transboundary reservoirs, and additional requirements may be set before development activities are allowed to begin.
>
> After signing both countries will work through their domestic systems to bring the Agreement into force.[5]

United States to Join Negotiations on International Code of Conduct for Space Activities

In January 2012, Secretary of State Hillary Clinton announced that the United States will enter into negotiations with the European Union and others on an "International Code of Conduct for Outer Space Activities," addressing issues such as space congestion and debris.[1] The U.S. Department of Defense, which relies heavily on secure access to space for communications, navigation, intelligence gathering, and many other functions, endorsed this effort.[2]

The United States led in negotiating the 1967 Outer Space Treaty[3] and other early space law instruments but in recent years has sometimes resisted space-related negotiations, viewing them as threats to U.S. freedom of action in pursuing U.S. security and other interests.[4] U.S. policy has evolved,[5] not least because the number of states and nonstate entities operating satellites has grown dramatically, as have the resulting risks of debris from satellite launches and failed satellites.[6] (The U.S. Department of Defense tracks over 22,000 man-made space objects; many other pieces of space debris are too small to track.) Secretary Clinton's statement follows:

[5] U.S. Dep't of Interior Press Release, *supra* note 3.

[1] Tejinder Singh, *U.S. Rushes to Endorse International Code of Conduct for Outer Space* (Feb. 8, 2012), *at* http://www.wall-street.com/2012/02/08/u-s-rushes-to-endorse-international-code-of-conduct-for-outer-space/.

[2] Lisa Daniel, *Defense, State Agree to Pursue Conduct Code for Outer Space* (Jan. 18, 2012), *at* http://www.defense.gov/home/features/2011/0111_nsss/docs/FINAL_DoD_Fact_Sheet_International_Code-2012_1-17-12.pdf.

[3] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Oct. 10, 1967, 18 UST 2410, 610 UNTS 205.

[4] John R. Crook, Contemporary Practice of the United States, 101 AJIL 185, 204 (2007); 102 AJIL 635, 667 (2008).

[5] John R. Crook, Contemporary Practice of the United States, 104 AJIL 654, 666 (2010).

[6] For discussion of the operational and security challenges of the current space environment, see U.S. Dep't of State Press Release, Space Security—An American Perspective, Remarks by Frank A. Rose, Deputy Ass't Secretary of State (Jan. 29, 2012), *at* http://www.state.gov/t/avc/rls/182703.htm.

The long-term sustainability of our space environment is at serious risk from space debris and irresponsible actors. Ensuring the stability, safety, and security of our space systems is of vital interest to the United States and the global community. These systems allow the free flow of information across platforms that open up our global markets, enhance weather forecasting and environmental monitoring, and enable global navigation and transportation.

Unless the international community addresses these challenges, the environment around our planet will become increasingly hazardous to human spaceflight and satellite systems, which would create damaging consequences for all of us.

In response to these challenges, the United States has decided to join with the European Union and other nations to develop an International Code of Conduct for Outer Space Activities. A Code of Conduct will help maintain the long-term sustainability, safety, stability, and security of space by establishing guidelines for the responsible use of space.

As we begin this work, the United States has made clear to our partners that we will not enter into a code of conduct that in any way constrains our national security-related activities in space or our ability to protect the United States and our allies. We are, however, committed to working together to reverse the troubling trends that are damaging our space environment and to preserve the limitless benefits and promise of space for future generations.[7]

A Department of State fact sheet with background on the proposed code of conduct follows:

Benefits of Space Systems

Space is vital to protecting U.S. economic prosperity and the national security interests of the United States, its allies, and partners. The benefits derived from space-based systems permeate almost every aspect of our daily life. The utilization of space helps by: warning of natural disasters; facilitating navigation and transportation globally; expanding our scientific frontiers; providing national decision makers with global communications, command, and control; monitoring strategic and military developments as well as supporting treaty monitoring and arms control verification; providing global access to financial operations; and scores of other activities worldwide. However, space, a domain that no nation owns but on which all rely, is becoming increasingly congested and contested.

Space Congestion

Today there are approximately 60 nations and government consortia that operate satellites, as well as numerous commercial and academic satellite operators, creating an environment that is increasingly congested. The Department of Defense tracks roughly 22,000 objects in orbit, of which 1,100 are active satellites. There are hundreds of thousands of additional objects too small to track but still capable of damaging satellites in orbit and the International Space Station. We need to work with the international community to address hazards and concerns that have arisen from this increasingly congested space environment.

[7] U.S. Dep't of State Press Release No. 2012/063, International Code of Conduct for Outer Space Activities, Press Statement, Hillary Rodham Clinton, Secretary of State (Jan. 17, 2011), *at* http://www.state.gov/secretary/rm/2012/01/180969.htm.

Threats to Space

The threats to the space environment will increase as more nations and non-state actors develop and deploy counter-space systems. Today space systems and their supporting infrastructure face a range of man-made threats that may deny, degrade, deceive, disrupt, or destroy assets. Irresponsible acts against space systems will have implications beyond the space environment, disrupting worldwide services upon which civil, commercial, and national security sectors depend. Given the increasing threat—through either irresponsible or unintentional acts—to the long-term *sustainability, stability, safety, and security* of space operations, we must work with the community of spacefaring nations to preserve the space environment for all nations and future generations.

An International Code of Conduct for Outer Space Activities

In response to these challenges, the United States reached a decision to formally work with the European Union and spacefaring nations to develop and advance an *International Code of Conduct for Outer Space Activities*. The European Union's draft Code of Conduct[8] is a good foundation for the development of a non-legally binding International Code of Conduct focused on the use of voluntary and pragmatic transparency and confidence-building measures to help prevent mishaps, misperceptions, and mistrust in space. An International Code of Conduct, if adopted, would establish guidelines for responsible behavior to reduce the hazards of debris-generating events and increase the transparency of operations in space to avoid the danger of collisions.

Protecting National and Economic Security

The Obama Administration is committed to ensuring that an International Code enhances national security and maintains the United States' inherent right of individual and collective self-defense, a fundamental part of international law. The United States would only subscribe to such a Code of Conduct if it protects and enhances the national and economic security of the United States, our allies, and our friends. The Administration is committed to keeping the U.S. Congress informed as our consultations with the spacefaring community progress.[9]

Congress Demands Quick Decision on Keystone Pipeline; State Department Recommends President Deny Permit Because Too Little Time for Environmental Review

The U.S. Department of State is responsible for processing applications for presidential permits for pipelines and other physical connections crossing the U.S. border.[1] During 2011, this authority placed the Department at the center of an intense public and congressional debate whether to approve the TransCanada Keystone XL Pipeline, proposed to carry heavy crude oil extracted from Alberta's tar sands to refineries around Houston and the Texas Gulf Coast.[2] Debate over the pipeline has pitted those concerned about the environmental effects both of

[8] The 2010 draft Code of Conduct of the European Union for Outer Space Activities is available online at http://www.consilium.europa.eu/uedocs/cmsUpload/st14455.en10.pdf.

[9] U.S. Dep't of State Press Release, An International Code of Conduct for Outer Space Activities: Strengthening Long-Term Sustainability, Stability, Safety, and Security in Space (Jan. 17, 2012), *at* http://www.state.gov/documents/organization/181208.pdf.

[1] John R. Crook, Contemporary Practice of the United States, 105 AJIL 568, 610 (2011).

[2] John M. Broder & Clifford Kraus, *State Dept. Backs Canadian Pipeline*, N.Y. TIMES, Aug. 27, 2011, at A1; Juliet Eilperin, *Plan for Canada-to-Texas Pipeline Moves Forward*, WASH. POST, Aug. 27, 2011, at A2.

increased production from tar sands and of the line's potential impact on sensitive areas in the United States[3] against proponents of increased U.S. access to Canadian oil[4] and unions and others seeking the jobs and economic development projected to result from pipeline construction.[5] In November 2011, faced with both changes resulting from Nebraska's objections to the proposed route across environmentally sensitive areas and growing public controversy,[6] the administration decided to delay its decision until 2013.[7]

Congressional supporters of the pipeline, particularly in the Republican-dominated House of Representatives, then sought to force an early decision on the permit application. In December 2011, Congress included a provision requiring a decision on Keystone's permit application within sixty days in "must-pass" legislation temporarily continuing a reduction in payroll taxes. In response, in January 2012, the Department of State recommended denial of the application because the legally required environmental studies could not be completed in the congressionally mandated sixty days.[8] The president agreed. The Department's announcement of its recommendation follows:

> Today, the Department of State recommended to President Obama that the presidential permit for the proposed Keystone XL Pipeline be denied and, that at this time, the TransCanada Keystone XL Pipeline be determined not to serve the national interest. The President concurred with the Department's recommendation, which was predicated on the fact that the Department does not have sufficient time to obtain the information necessary to assess whether the project, in its current state, is in the national interest.
>
> Since 2008, the Department has been conducting a transparent, thorough, and rigorous review of TransCanada's permit application for the proposed Keystone XL Pipeline project. As a result of this process, particularly given the concentration of concerns regarding the proposed route through the Sand Hills area of Nebraska, on November 10, 2011, the Department announced that it could not make a national interest determination regarding the permit application without additional information. Specifically, the Department called for an assessment of alternative pipeline routes that avoided the uniquely sensitive terrain of the Sand Hills in Nebraska. The Department estimated, based on prior projects of similar length and scope, that it could complete the necessary review to make a decision by the first quarter of 2013. In consultations with the State of Nebraska and TransCanada, they agreed with the estimated timeline.
>
> On December 23, 2011, the Congress passed the Temporary Payroll Tax Cut Continuation Act of 2011 ("the Act"). The Act provides 60 days for the President to determine whether the Keystone XL pipeline is in the national interest—which is insufficient for such a determination.

[3] Editorial, *Wrong Pipeline, Wrong Assessment*, N.Y. TIMES, July 21, 2011, at A22.

[4] Editorial, *Pipeline Politics*, WASH. POST, Aug. 14, 2011, at A16.

[5] Juliet Eilperin, *Oil Pipeline a Political Problem for Obama*, WASH. POST, Oct. 8, 2011, at A3; Juliet Eilperin & Steven Mufson, *A Pipeline Predicament for Obama*, WASH. POST, Oct. 17, 2011, at A1.

[6] John M. Broder, *Watchdog Announces Special Inquiry on Contested Pipeline*, N.Y. TIMES, Nov. 8, 2011, at A12; Steven Mufson, *Pipeline Permitting Process Will Be Reviewed*, WASH. POST, Nov. 8, 2011, at A4.

[7] Juliet Eilperin, *Pipeline Route May Get Another Look from U.S.*, WASH. POST, Nov. 10, 2011, at A20; John M. Broder & Dan Frosch, *U.S. Review Expected to Delay Oil Pipeline Past the Election*, N.Y. TIMES, Nov. 11, 2011, at A1; Juliet Eilperin, *Administration Delays Decision on Oil Pipeline*, WASH. POST, Nov. 11, 2011, at A1.

[8] John M. Broder & Dan Frosch, *Politics Stamps Out Oil Sands Pipeline, Yet It Seems Likely to Endure*, N.Y. TIMES, Dec. 24, 2011, at A12; John M. Broder & Dan Frosch, *Proposed Oil Pipeline Is Bogged Down by Politics*, N.Y. TIMES, Jan. 19, 2012, at A10; Editorial, *A Good Call on the Pipeline*, N.Y. TIMES, Jan. 18, 2011, at A20.

> The Department's denial of the permit application does not preclude any subsequent permit application or applications for similar projects.[9]

United States Imposes Limited Anti-whaling Sanctions on Iceland

The United States opposes Iceland's policy of allowing commercial whaling by its nationals[1] and in September 2011 imposed limited nontrade sanctions on Iceland in response to its continued commercial whaling. The Pelly Amendment[2] authorizes the president to ban imports into the United States of products from countries that conduct fishing operations that undercut international conservation programs. It provides in relevant part:

> (1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.
>
> . . . .
>
> (4) Upon receipt of any certification made under paragraph (1) . . . the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization (as defined in [19 U.S.C. §] 3501(8) . . . or the multilateral trade agreements (as defined in [19 U.S.C. §] 3501(4). . .).

In July 2011, Secretary of Commerce Gary Locke certified to the president that Icelandic nationals were conducting whaling activities that diminish the effectiveness of the International Whaling Commission (IWC) conservation program.[3] In September 2011, President Barack Obama addressed a memorandum to the vice president, the secretary of state, and twenty other department heads and senior officials directing a range of modest diplomatic and other measures in response to continued Icelandic whaling. The president did not order any sanctions on trade. His memorandum follows:

> On July 19, 2011, Secretary of Commerce Gary Locke certified under section 8 of the Fisherman's Protective Act of 1967, as amended (the "Pelly Amendment") (22 U.S.C. 1978), that nationals of Iceland are conducting whaling activities that diminish the effectiveness of the International Whaling Commission (IWC) conservation program. In his letter of July 19, 2011, Secretary Locke expressed his concern for these actions, and I share these concerns.
>
> To ensure that this issue continues to receive the highest level of attention, and in accordance with Secretary Locke's recommendations, I direct: (1) relevant U.S. delegations attending meetings with Icelandic officials and senior Administration officials visiting Iceland to raise U.S. concerns regarding commercial whaling by Icelandic companies and seek ways to halt such action; (2) Cabinet secretaries to evaluate the appropriateness of visits to

[9] U.S. Dep't of State Press Release No. 2012/070, Denial of the Keystone XL Pipeline Application (Jan. 18, 2012), *at* http://www.state.gov/r/pa/prs/ps/2012/01/181473.htm.

[1] John R. Crook, Contemporary Practice of the United States, 103 AJIL 325, 366 (2009).

[2] 22 U.S.C. §1978.

[3] Letter from Secretary of Commerce Gary Locke to President Barack Obama, July 19, 2011, *at* http://www.noaanews.noaa.gov/stories2011/pdfs/pellygrantsignedletter_final.pdf.

> Iceland depending on continuation of the current suspension of fin whaling; (3) the Department of State to examine Arctic cooperation projects, and where appropriate, link U.S. cooperation to the Icelandic government changing its whaling policy and abiding by the IWC moratorium on commercial whaling; (4) the Departments of Commerce and State to consult with other international actors on efforts to end Icelandic commercial whaling and have Iceland abide by the IWC moratorium on commercial whaling; (5) the Department of State to inform the Government of Iceland that the United States will continue to monitor the activities of Icelandic companies that engage in commercial whaling; and (6) relevant U.S. agencies to continue to examine other options for responding to continued whaling by Iceland.
>
> I direct the Secretaries of State and Commerce to continue to keep the situation under review and to continue to urge Iceland to cease its commercial whaling activities. It is my expectation that departments and agencies make substantive progress towards their implementation. To this end, within 6 months, or immediately upon the resumption of fin whaling by Icelandic nationals, I direct departments and agencies to report to me on their actions through the Departments of State and Commerce.
>
> I believe that these actions hold the most promise of effecting a reduction in Iceland's commercial whaling activities, and support our broader conservation efforts.[4]

The president described the Icelandic whaling operations leading to his action in a report to Congress. Excerpts follow:

> In 1982, the IWC set catch limits for all commercial whaling at zero. This decision, known as the commercial whaling moratorium, is in effect today. Iceland abided by the moratorium until 1992, when it withdrew from the IWC. In 2002, Iceland rejoined the IWC with a reservation to the moratorium on commercial whaling. In 2003, Iceland began a lethal scientific research whaling program. In 2004, Secretary of Commerce Donald L. Evans certified Iceland under the Pelly Amendment for lethal scientific research whaling. When Iceland resumed commercial whaling in 2006, Secretary Carlos M. Gutierrez retained Iceland's certification, which remains in effect today.
>
> Iceland's commercial harvest of fin whales escalated dramatically over the past few years. In addition, Iceland recently resumed exporting whale products. Of particular concern to the United States, Iceland harvested 125 endangered fin whales in 2009 and 148 in 2010, a significant increase from the total of 7 fin whales it commercially harvested between 1987 and 2007.
>
> Iceland's sole fin whaling company, Hvalur hf, suspended its fin whaling due to the earthquake and tsunami in Japan, where it exports its whale meat. Despite this suspension, Iceland continues to permit whaling and has a government issued fin whale quota in effect for the 2011 season that continues to exceed catch levels that the IWC's scientific body advised would be sustainable if the moratorium was removed. This continues to present a threat to the conservation of fin whales. Further, Icelandic nationals continue to hunt minke whales commercially and Iceland's exports of whale meat to Japan reportedly increased significantly in both March and April 2011.

[4] White House Press Release, Memorandum Regarding Pelly Certification and Icelandic Whaling (Sept. 15, 2011), *at* http://www.whitehouse.gov/the-press-office/2011/09/15/memorandum-regarding-pelly-certification-and-icelandic-whaling.

Iceland's actions threaten the conservation status of an endangered species and undermine multilateral efforts to ensure greater worldwide protection for whales.[5]

INTERNATIONAL ECONOMIC LAW

U.S. Supreme Court Upholds Extending Copyright to Unprotected Works to Comply with Berne Convention

In January 2012, the U.S. Supreme Court by a 6-2 vote[1] rejected constitutional challenges to U.S. legislation adopted in 1994 to bring the United States into compliance with its international copyright obligations.[2] The challenged legislation extends copyright protection to some works by foreign creators not previously protected in the United States, including films by Hitchcock and Fellini, books by Virginia Woolfe and C. S. Lewis, symphonies by Prokofiev and Stravinsky, and Picasso's *Guernica*.[3] The plaintiffs in the case, including a symphony conductor, the ACLU, Google, and the American Library Association, contended that the legislation exceeded Congress's powers under the U.S. Constitution's Copyright and Patent Clause[4] and interfered with their First Amendment rights.[5]

The Supreme Court's syllabus nicely summarizes the background of the case.

> The Berne Convention for the Protection of Literary and Artistic Works (Berne), which took effect in 1886, is the principal accord governing international copyright relations. Berne's 164 member states agree to provide a minimum level of copyright protection and to treat authors from other member countries as well as they treat their own. Of central importance in this case, Article 18 of Berne requires countries to protect the works of other member states unless the works' copyright term has expired in either the country where protection is claimed or the country of origin. A different system of transnational copyright protection long prevailed in this country. Throughout most of the 20th century, the only foreign authors eligible for Copyright Act protection were those whose countries granted reciprocal rights to American authors and whose works were printed in the United States. Despite Article 18, when the United States joined Berne in 1989, it did not protect any foreign works lodged in the U.S. public domain, many of them works never protected here. In 1994, however, the Agreement on Trade-Related Aspects of Intellectual Property Rights mandated implementation of Berne's first 21 articles, on pain of enforcement by the World Trade Organization.
>
> In response, Congress applied the term of protection available to U.S. works to preexisting works from Berne member countries. Section 514 of the Uruguay Round Agreements Act (URAA) grants copyright protection to works protected in their country of origin, but lacking protection in the United States for any of three reasons: The United States

[5] White House Press Release, Message from the President to Congress (Sept. 15, 2011), *at* http://www.whitehouse.gov/the-press-office/2011/09/15/message-president-congress.

[1] Justice Ginsburg wrote for the Court; Justice Breyer, joined by Justice Alito, dissented. Justice Kagan did not participate.

[2] Adam Liptak, *Public Domain Works Can Be Copyrighted Anew, Supreme Court Rules*, N.Y. TIMES, Jan. 19, 2012, at B12.

[3] Adam Liptak, *Once in the Public's Hands, Now Back in Picasso's*, N.Y. TIMES, Mar. 22, 2011, at A16; Adam Liptak, *In Supreme Court Argument, A Rock Legend Plays a Role*, N.Y. TIMES, Oct. 7, 2011, at B2.

[4] U.S. CONST. art. I, §8, cl. 8 ("Congress shall have Power . . . [t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings.").

[5] Robert Barnes, *Copyright Case Will Decide Fate of Millions of Once-Public Works*, WASH. POST, Oct. 5, 2011, at A3.

did not protect works from the country of origin at the time of publication; the United States did not protect sound recordings fixed before 1972; or the author had not complied with certain U.S. statutory formalities. Works encompassed by §514 are granted the protection they would have enjoyed had the United States maintained copyright relations with the author's country or removed formalities incompatible with Berne. As a consequence of the barriers to U.S. copyright protection prior to §514's enactment, foreign works "restored" to protection by the measure had entered the public domain in this country. To cushion the impact of their placement in protected status, §514 provides ameliorating accommodations for parties who had exploited affected works before the URAA was enacted.

Petitioners are orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works §514 removed from the public domain. They maintain that Congress, in passing §514, exceeded its authority under the Copyright Clause and transgressed First Amendment limitations.[6]

The initial pages of Justice Ginsburg's scholarly majority opinion survey the United States' checkered history in international copyright protection, including its failure to protect foreign works for many years and its eventual grudging acceptance of the Berne Convention. The opinion then rejects the first of the petitioners' two arguments:

The text of the Copyright Clause does not exclude application of copyright protection to works in the public domain. Symposium, Congressional Power and Limitations Inherent in the Copyright Clause, 30 Colum. J. L. & Arts 259, 266 (2007). Petitioners' contrary argument relies primarily on the Constitution's confinement of a copyright's lifespan to a "limited Tim[e]." "Removing works from the public domain," they contend, "violates the 'limited [t]imes' restriction by turning a fixed and predictable period into one that can be reset or resurrected at any time, even after it expires." Brief for Petitioners 22.

Our decision in [*Eldred* v. *Ashcroft*, 537 U.S. 186 (2003)] is largely dispositive of petitioners' limited-time argument. There we addressed the question whether Congress violated the Copyright Clause when it extended, by 20 years, the terms of existing copyrights. 537 U.S., at 192–193 (upholding Copyright Term Extension Act (CTEA)). Ruling that Congress acted within constitutional bounds, we declined to infer from the text of the Copyright Clause "the command that a time prescription, once set, becomes forever 'fixed' or 'inalterable.'" *Id.* at 199.[7]

The petitioners' First Amendment arguments also failed to impress the majority.

However spun, these contentions depend on an argument we considered and rejected above, namely, that the Constitution renders the public domain largely untouchable by Congress. Petitioners here attempt to achieve under the banner of the First Amendment what they could not win under the Copyright Clause: On their view of the Copyright Clause, the public domain is inviolable; as they read the First Amendment, the public domain is policed through heightened judicial scrutiny of Congress' means and ends. As we have already shown, see *supra,* at 13–19, the text of the Copyright Clause and the historical record scarcely establish that "once a work enters the public domain," Congress cannot permit anyone "not even the creator—[to] copyright it," 501 F.3d, at 1184. And nothing in the historical record, congressional practice, or our own jurisprudence warrants

[6] Golan v. Holder, 132 S.Ct. 873, 875 (2012).

[7] *Id.* at 884 (parallel citations omitted).

exceptional First Amendment solicitude for copyrighted works that were once in the public domain. Neither this challenge nor that raised in *Eldred*, we stress, allege Congress transgressed a generally applicable First Amendment prohibition; we are not faced, for example, with copyright protection that hinges on the author's viewpoint.[8]

United States Imposes Sanctions on Iranian Financial Institutions and Banks Doing Business with Them

Section 1245 of the National Defense Authorization Act for Fiscal Year 2012[1] directs the president to add heavy new financial sanctions to the existing array of U.S. economic sanctions against Iran. The new sanctions include freezing of Iranian financial assets in the United States or in the control of U.S. persons, and prohibiting transactions with third-country financial institutions that do business with Iran's central bank or major Iranian banks.[2] Excerpts from Section 1245 follow:

(1) . . . (c) FREEZING OF ASSETS OF IRANIAN FINANCIAL INSTITUTIONS.—The President shall, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), block and prohibit all transactions in all property and interests in property of an Iranian financial institution if such property and interests in property are in the United States, come within the United States, or are or come within the possession or control of a United States person.

(d) IMPOSITION OF SANCTIONS WITH RESPECT TO THE CENTRAL BANK OF IRAN AND OTHER IRANIAN FINANCIAL INSTITUTIONS.—

(1) IN GENERAL.—Except as specifically provided in this subsection, beginning on the date that is 60 days after the date of the enactment of this Act, the President—

(A) shall prohibit the opening, and prohibit or impose strict conditions on the maintaining, in the United States of a correspondent account or a payable-through account by a foreign financial institution that the President determines has knowingly conducted or facilitated any significant financial transaction with the Central Bank of Iran or another Iranian financial institution designated by the Secretary of the Treasury for the imposition of sanctions pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.); and

(B) may impose sanctions pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) with respect to the Central Bank of Iran.

(2) EXCEPTION FOR SALES OF FOOD, MEDICINE, AND MEDICAL DEVICES.—The President may not impose sanctions under paragraph (1) with respect to any person for conducting or facilitating a transaction for the sale of food, medicine, or medical devices to Iran.

(3) APPLICABILITY OF SANCTIONS WITH RESPECT TO FOREIGN CENTRAL BANKS.—Except as provided in paragraph (4), sanctions imposed under paragraph (1)(A) shall apply with respect to a foreign financial institution owned or controlled by

[8] *Id.* at 891–92 (footnotes omitted).

[1] See section above: *President's Signing Statement Objects to Detention Provisions in Defense Legislation.*

[2] Mark Landler, *U.S. and Its Allies Expand Sanctions Against Iran*, N.Y. TIMES, Nov. 22, 2011, at A6; Rick Gladstone & Nicholas Kulish, *West Tightens Iran Sanctions After Embassy Attack*, N.Y. TIMES, Dec. 2, 2011, at A10; Rick Gladstone, *Penalties May Send Oil Prices Soaring, Iran Warns*, N.Y. TIMES, Dec. 6, 2011, at A9.

the government of a foreign country, including a central bank of a foreign country, only insofar as it engages in a financial transaction for the sale or purchase of petroleum or petroleum products to or from Iran conducted or facilitated on or after that date that is 180 days after the date of the enactment of this Act.

(4) APPLICABILITY OF SANCTIONS WITH RESPECT TO PETROLEUM TRANSACTIONS.—

(A) REPORT REQUIRED.—Not later than 60 days after the date of the enactment of this Act, and every 60 days thereafter, the Administrator of the Energy Information Administration . . . shall submit to Congress a report on the availability and price of petroleum and petroleum products produced in countries other than Iran in the 60-day period preceding the submission of the report.

(B) DETERMINATION REQUIRED.—. . . [T]he President shall make a determination, based on the reports required by subparagraph (A), of whether the price and supply of petroleum and petroleum products produced in countries other than Iran [are] sufficient to permit purchasers of petroleum and petroleum products from Iran to reduce significantly in volume their purchases from Iran.

(C) APPLICATION OF SANCTIONS.—Except as provided in subparagraph (D), sanctions imposed under paragraph (1)(A) shall apply with respect to a financial transaction conducted or facilitated by a foreign financial institution on or after the date that is 180 days after the date of the enactment of this Act for the purchase of petroleum or petroleum products from Iran if the President determines pursuant to subparagraph (B) that there is a sufficient supply of petroleum and petroleum products *from countries other than Iran to permit a significant reduction in the volume* of petroleum and petroleum products purchased from Iran by or through foreign financial institutions.

(D) EXCEPTION.—Sanctions imposed pursuant to paragraph (1) shall not apply with respect to a foreign financial institution if the President determines and reports to Congress . . . that the country with primary jurisdiction over the foreign financial institution has significantly reduced its volume of crude oil purchases from Iran . . . .

(5) WAIVER.—The President may waive the imposition of sanctions under paragraph (1) for a period of not more than 120 days, and may renew that waiver for additional periods of not more than 120 days, if the President—

(A) determines that such a waiver is in the national security interest of the United States. . . .

In early February 2012, President Obama issued an executive order that, inter alia, implements the freeze of the assets of Iranian financial institutions mandated by the legislation.[3]

[3] White House Press Release, Message—Blocking Property of the Government of Iran and Iranian Financial Institutions (Feb. 6, 2012), *at* http://www.whitehouse.gov/the-press-office/2012/02/06/executive-order-blocking-property-government-iran-and-iranian-financial-. *See* Jackie Calmes & Rick Gladstone, *Obama Imposes Freeze on Iran Property in U.S.*, N.Y. TIMES, Feb. 7, 2012, at A11.

INTERNATIONAL HUMAN RIGHTS

U.S. Government Supreme Court Brief Backs Corporate ATS Liability

In 2011, the U.S. Supreme Court granted certiorari to hear the appeal of the Second Circuit's decision in *Kiobel v. Royal Dutch Petroleum*,[1] involving whether corporations can be liable for violations of international law under the Alien Tort Statute[2] (ATS). In *Kiobel*, the Second Circuit ruled that the issue of corporate liability for violations of international human rights law must be determined under customary international law. The court found no norm of customary international law establishing such liability and dismissed the claims of the plaintiffs, who are "residents of Nigeria who claim that Dutch, British, and Nigerian corporations engaged in oil exploration and production aided and abetted the Nigerian government in committing violations of the law of nations."[3] Several other courts of appeals have reached a contrary result, ruling that the issue whether corporations can be liable for ATS violations is a matter of domestic and not international law.[4]

The Supreme Court granted certiorari to consider

1. Whether the issue of corporate liability under the Alien Tort Statue (ATS), 28 U.S.C. 1350, is a merits question or a question of subject-matter jurisdiction.
2. Whether a corporation can be held liable in a federal common law action brought under the ATS.[5]

In December 2011, the United States filed an amicus curiae brief supporting the plaintiffs in the case and seeking reversal of the Second Circuit's decision.[6] The brief was signed, inter alia, by Solicitor General Donald Verelli, Department of State Legal Adviser Harold Koh, and Department of Commerce General Counsel Cameron F. Kerry. It described the question presented and the U.S. interest as follows:

> This case presents the question whether a corporation can be held liable in a federal common law action brought under the Alien Tort Statute (ATS), 28 U.S.C. 1350. The United States has an interest in the proper application of the ATS because such actions can have implications for the Nation's foreign and commercial relations and for the enforcement of international law.[7]

The government's brief argues that corporations (or agents acting on their behalf) can violate international human rights norms, just as natural persons can. The brief also stated that "[w]hether corporations should be held accountable for those violations in private tort suits

[1] Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010), *cert. granted* 132 S.Ct. 472 (2011); *see* John R. Crook, Contemporary Practice of the United States, 105 AJIL 122, 142 (2011).

[2] 28 U.S.C. §1350.

[3] *Kiobel*, 621 F.3d at 117.

[4] *See* John R. Crook, Contemporary Practice of the United States, 105 AJIL 775, 799 (2011).

[5] *See* John R. Crook, Contemporary Practice of the United States, 106 AJIL 138, 169 (2012).

[6] Brief for the United States as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petroleum (Dec. 2011), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_unitedstates.authcheckdam.pdf.

[7] *Id.* at 1.

under the ATS is a question of federal common law,"[8] not a question of international law. The "Summary of the Argument" from the government's brief follows:

> I. The court of appeals erred in characterizing the question whether a corporation can be held liable in a federal common law action based on the ATS as one of subject-matter jurisdiction. "[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). When an alien plaintiff alleges a nonfrivolous claim of a tort in violation of the law of nations—as petitioners did here—a district court has subject-matter jurisdiction under the ATS.
>
> The court of appeals nonetheless had jurisdiction under 28 U.S.C. 1292(b) to decide the issue of corporate liability here. Although that issue was neither raised in nor decided by the district court, it can be regarded as fairly included within the court's certified order. As a prudential matter, the court should not have decided that issue on appeal. But because this Court has already granted certiorari and the issue of corporate liability will now be fully briefed, it would be appropriate for the Court to decide that question rather than vacate and remand.
>
> II. The merits question before this Court is narrow: whether a corporation can be held liable in a federal common law action based on the ATS. Although there are a number of other issues in the background of this case (*e.g.*, aiding-and-abetting liability, extra-territoriality, etc.), those issues were not decided by the court of appeals here. This Court therefore should address only the corporate-liability issue. On that issue, the court of appeals' holding is categorical and applies to all suits under the ATS, regardless of the theory of liability, the locus of the acts, the involvement of a foreign sovereign, or the character of the international-law norm at issue.
>
> A. A corporation's liability in a suit under the ATS does not depend on the existence of a generally accepted and well-defined international law norm of corporate liability for law-of-nations violations. The particular limitation this Court found dispositive in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004)—that any claim under the ATS must at least "rest on a norm of international character accepted by the civilized world and defined with" sufficient "specificity," *id.* at 725—pertains to the international-law norm itself and not to whether (or how) that norm should be enforced in a suit under the ATS. The latter question is a matter to be determined by federal courts cautiously exercising their "residual common law discretion." *Id.* at 738. International law informs, but does not control, the exercise of that discretion.
>
> At the present time, the United States is not aware of any international-law norm of the sort identified in *Sosa* that distinguishes between natural and juridical persons. Corporations (or agents acting on their behalf) can violate those norms just as natural persons can. Whether corporations should be held accountable for those violations in private tort suits under the ATS is a question of federal common law.
>
> B. Courts may recognize corporate liability in actions under the ATS as a matter of federal common law. The text and history of the ATS itself provide no basis for distinguishing between natural and juridical persons. Corporations have been subject to suit for centuries, and the concept of corporate liability is a well-settled part of our "legal culture." Pet. App. A8. *Sosa*'s cautionary admonitions provide no reason to depart from the common law on this issue.
>
> International law does not counsel otherwise. Although no international tribunal has been created for the purpose of holding corporations civilly liable for violations of

[8] *Id.* at 7.

> international law, the same is true for natural persons. And while international *criminal* tribunals have, thus far, been limited to the prosecution of natural persons, that appears to be because of matters unique to criminal punishment. Notably, several countries that have incorporated international criminal offenses into their domestic law apply those offenses to corporations.[9]

Shortly after the late February 2012 oral argument in the case, the Supreme Court ordered further proceedings to consider whether the ATS applies to conduct occurring within a foreign territory. The text of the Court order follows:

> This case is restored to the calendar for reargument. The parties [are] directed to file supplemental briefs addressing the following question: "Whether and under what circumstances the Alien Tort Statute, *28 U.S.C. §1350*, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." The supplemental brief of petitioners is due on or before Thursday, May 3, 2012. The supplemental brief of respondents is due on or before Monday, June 4, 2012. The reply brief is due on or before Friday, June 29, 2012. The time to file *amicus curiae* briefs is as provided for by *Rule 37.3(a)*. The word limits and cover colors for the briefs should correspond to the provisions of *Rule 33.1(g)* pertaining to briefs on the merits rather than to the provision pertaining to supplemental briefs.[10]

INTERNATIONAL CRIMINAL LAW

U.S. Official Describes U.S. Policy Toward International Criminal Court

In a statement to the Assembly of States Parties to the Statute of the International Criminal Court (ICC) in mid-December 2011, Ambassador-at-Large for War Crimes Issues Stephen J. Rapp described U.S. views on international criminal justice and the ICC. A substantial excerpt follows:

> *[A]lthough the United States is not a party to the Rome Statute, we are continuing to* engage with the ICC and States Parties to the Rome Statute to end impunity for the worst crimes. Over the past several years, we have sent active observer delegations to the [Assembly of States Parties] sessions and the Review Conference in Kampala. We have actively engaged with the [Office of the Prosecutor] and the Registrar to consider specific ways that we can support specific prosecutions already underway, and we have responded positively to a number of informal requests for assistance. We supported the UN Security Council's ICC referral regarding Libya and are working hard to ensure that those charged by the Court there face justice consistent with international standards. From the [Democratic Republic of the Congo] to Cote d'Ivoire, Darfur to Libya, we have worked to strengthen accountability for atrocities because we know, as President Obama has said, that "justice is a critical ingredient for lasting peace."
>
> What are the concrete steps we can take to continue to advance this common cause?
>
> First, at both the international and national levels, we should continue to recognize and promote the important role that justice and reconciliation play in resolving conflicts. . . . [S]ince we last met in New York one year ago, the Security Council made history with its

[9] *Id.* at 5–8.

[10] *Kiobel*, 182 L.Ed.2d 270, 270–71 (Mar. 5, 2012); *see also* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-1491.htm.

first unanimous referral to the ICC of the situation in Libya. Resolution 1970, adopted even as atrocities were being perpetrated, represented an historic milestone in the fight against impunity.[1]

. . . .

Second, States must elevate as a priority the prevention of and response to mass atrocities, and work to marshal and coordinate their own capacities. Since we last addressed this Assembly, in August 2011, President Obama issued a presidential directive in which he identified the prevention of mass atrocities and genocide as a core national security interest, as well as a moral responsibility, of the United States. Accordingly, he directed the creation of an Atrocities Prevention Board to coordinate a whole-of-government approach to preventing and responding to genocide and mass atrocities. . . .[2]

On the same day President Obama announced this new effort, he also issued a Presidential Proclamation restricting entry into the United States of persons who participate in serious human rights and humanitarian law violations. Ensuring there is no safe haven for perpetrators of mass atrocities is key to establishing a mutually reinforcing world-wide network to combat impunity for the most serious crimes.

. . . .

There are many ways States can lend tangible support to the protection of witnesses and judicial officers. Witness protection programs need funding from partner States, expert collaboration from domestic officials and practitioners, training, and resources. For example, this year we renewed our funding for a witness protection project implemented by the Joint Human Rights Office of MONUSCO, the UN Organization Stabilization Mission in the Democratic Republic of the Congo. We have supported similar efforts in other situation countries. This is a good start, but these ad hoc efforts need to be institutionalized and expanded to fill the wide gap. States can also fulfill the important function of accepting witnesses for resettlement where their participation in trials is vital, but their living conditions at home are too dangerous to tolerate. . . .

Madame President, it is a persistent and serious cause for concern that eight individuals who are the subject of existing ICC arrest warrants remain at large. The recent transfer of former President Laurent Gbagbo to The Hague to face charges of crimes against humanity is an important step forward. But the landscape remains challenging. Years after their warrants were issued, the suspects who currently remain at large all too often remain free to continue to commit serious human rights violations, which contributes to the cycle of impunity and persistent instability. The international community must demonstrate its respect for accountability, and should bring diplomatic pressure to bear on States that would invite or host these individuals.

. . . .

States can also lend expertise and logistical support to efforts to apprehend these fugitives. . . . I am pleased to be able to report that, with the consent of governments in the region, the United States recently sent a small number of U.S. military advisors to the region to assist the forces that are pursuing the [Lord's Resistance Army] and seeking to bring its top commanders to justice. . . .[3]

[1] [Editor's note: *see* John R. Crook, Contemporary Practice of the United States, 105 AJIL 568, 569 (2011).]
[2] [Editor's note: *see* John R. Crook, Contemporary Practice of the United States, 105 AJIL 775, 805 (2011).]
[3] [Editor's note: *see* John R. Crook, Contemporary Practice of the United States, 106 AJIL 138, 168 (2012).]

> These efforts are part of a larger U.S. government commitment to support international criminal justice in its many forms. We support the continuing important work of the ad hoc tribunals, and look forward to the creation of the Residual Mechanism. We look forward to the successful completion of the important Karadzic, Mladic, and Hadzic cases, which will bring an important element of closure to the tragedy that consumed the Balkans in the 1990s. . . .[4]

U.S. Agreements and Actions to Combat Smuggling of Cultural Property

The United States has concluded agreements with at least fourteen foreign countries in the framework of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[1] These agreements are intended to combat smuggling of archeological and ethnological materials illegally removed from their countries of origin.[2] A U.S. Department of State website explains:

> The United States is one of over 115 states party to the *1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* ("the Convention"). The Department of State is responsible for administering the Convention by means of the enabling legislation entitled *The Convention on Cultural Property Implementation Act* ("the Act"). The Act allows the U.S. to consider requests from any state party to the Convention to impose import restrictions on archaeological or ethnological material when pillage of these materials places a nation's cultural heritage in jeopardy. (See the Act as Public Law 97-446; or as 19 U.S.C. 2601 et seq.)
>
> Pursuant to the statutory process detailed in the Act, the Department receives foreign government requests for import restrictions. These are reviewed by the Cultural Property Advisory Committee, which makes recommendations to the Department. The Department may decide to enter into an agreement with a requesting country that not only imposes import restrictions, but also promotes international collaboration in developing sustainable safeguards for cultural heritage, and increased international access to it for cultural, educational, and scientific purposes.[3]

In December 2011, the Department of State announced the renewal of the U.S. agreement with Bolivia for an additional five-year term[4] and the entry into force of an agreement with Greece. The Department's announcement of the agreement with Greece follows:

> With an exchange of diplomatic notes on November 21, 2011, the agreement to protect Greece's cultural heritage, which Secretary of State Hillary Rodham Clinton and then Minister of Foreign Affairs Stavros Lambrinidis signed on July 17, 2011, entered into force.

[4] U.S. Dep't of State Press Release, U.S. Statement to the Assembly of States Parties of the International Criminal Court (Dec. 14, 2011), *at* http://www.state.gov/j/gcj/us_releases/remarks/179208.htm.

[1] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 UNTS 231, 10 ILM 289 (1971), *available at* http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[2] *See* John R. Crook, Contemporary Practice of the United States, 100 AJIL 455, 460 (2006).

[3] U.S. Dep't of State, International Cultural Property Protection, *at* http://exchanges.state.gov/heritage/culprop.html.

[4] U.S. Dep't of State Press Release No. 2011/2115, Extension of Bilateral Agreement to Continue Import Restrictions on Archaeological and Ethnological Material (Dec. 12, 2011), *at* http://www.state.gov/r/pa/prs/ps/2011/12/178618.htm.

> The agreement, *Memorandum Of Understanding Between The Government Of The United States Of America And The Government Of The Hellenic Republic Concerning The Imposition Of Import Restrictions On Certain Categories Of Greek Archaeological And Byzantine Ecclesiastical Ethnological Material Through The 15th Century A.D. Of The Hellenic Republic*, will strengthen and enhance collaboration to reduce looting and trafficking of antiquities, and provide for their return to Greece. It also aims to further the international interchange of such materials for cultural, educational, and scientific purposes. The agreement builds on the United States' long-term commitment to cultural preservation and is consistent with a recommendation of the Cultural Property Advisory Committee, administered by the U.S. Department of State's Bureau of Educational and Cultural Affairs.
>
> The U.S. Department of Homeland Security and the U.S. Department of the Treasury jointly published on December 1, 2011 in the Federal Register a Designated List of restricted archaeological material representing the Upper Paleolithic Period (beginning approximately 20,000 B.C.) through the 15th century A.D.
>
> This cooperation between the United States and Greece is possible within the framework of the 1970 UNESCO Convention to reduce the pillage of cultural heritage sites. Through special enabling legislation, the U.S. Department of State implements the *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.*
>
> The Designated List and more information can be found at http://exchanges.state.gov/heritage/culprop.html.[5]

In July 2011, U.S. authorities announced the arrest and indictment of four persons charged with smuggling Egyptian antiquities into the United States.[6] A senior investigator for the U.S. Department of Homeland Security has noted that the case marks

> the first time an alleged cultural property network has been dismantled within the United States. . . . In addition to smuggling cultural property, this case also focuses on significant money laundering activity. This is notable because the illicit sale of cultural property is the third most profitable black market industry following narcotics and weapons trafficking.[7]

An excerpt from the announcement by the Office of the U.S. Attorney for the Eastern District of New York follows:

> An indictment was unsealed yesterday in federal court in Brooklyn charging Mousa Khouli, also known as "Morris Khouli," Salem Alshdaifat, Joseph A. Lewis, II, and Ayman Ramadan, with conspiring to smuggle Egyptian antiquities into the United States and conspiring to launder money in furtherance of smuggling.
>
> . . . .

[5] U.S. Dep't of State Press Release No. 2011/2068, The United States and Greece Finalize Agreement to Protect the Archaeological and Byzantine Heritage of Greece Through the 15th Century A.D. (Dec. 6, 2011), *at* http://www.state.gov/r/pa/prs/ps/2011/12/178328.htm.

[6] Kate Taylor, *4 Charged in Smuggling Egyptian Antiquities*, N.Y. TIMES, July 15, 2011, at C20.

[7] U.S. Atty's Office (E.D. N.Y.) Press Release, Dealers and Collector Charged with Smuggling Egyptian Antiquities: Set of Sarcophagi over 2,000 Years Old and Other Egyptian Antiquities Recovered (July 14, 2011), *at* http://www.justice.gov/usao/nye/pr/2011/2011jul14.html.

As alleged in the indictment, from October 2008 through November 2009, Lewis purchased a Greco-Roman style Egyptian sarcophagus, a nesting set of three Egyptian sarcophagi, a set of Egyptian funerary boats and Egyptian limestone figures from Khouli, who earlier acquired those items from Alshdaifat and Ramadan. Each of these antiquities was exported from Dubai, United Arab Emirates, and smuggled into the United States using a variety of illegal methods intended to avoid detection and scrutiny by U.S. Customs & Border Protection ("Customs"). Specifically, the defendants allegedly made false declarations to Customs concerning the country of origin and value of the antiquities, and provided misleading descriptions of the contents on shipping labels and customs paperwork, such as "antiques," "wood panels" and "wooden painted box."[8]

USE OF FORCE AND ARMS CONTROL

U.S. Efforts Supporting New CCW Protocol on Cluster Munitions Fail

The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (commonly referred to as the Convention on Conventional Weapons or CCW)[1] is a chapeau convention, to which protocols regulating specific types of weapons have been added over time.[2] They have included nondetectable fragments, mines and booby traps, incendiary weapons, blinding laser weapons, and explosive remnants of war.[3] Protocols are adopted by consensus. This method means that they tend to be tightly drawn and limited in scope, but it also increases the prospects of their adoption and implementation by major military powers.

The United States has opposed calls to ban cluster munitions outright, regarding them as legitimate weapons with military utility in combat, but has supported negotiations on a CCW protocol regulating them.[4] In November 2011, the U.S. delegation to the CCW's Fourth Review Conference pressed for adoption of such a protocol requiring the elimination of large numbers of older cluster munitions. However, the proposed new protocol limiting, but not eliminating, these weapons, met strong opposition from a group of about fifty states, led by Austria, Mexico, and Norway, that are parties to the Convention on Cluster Munitions, also known as the Oslo Convention.[5] The Oslo Convention bans the parties' possession and use of almost all of these weapons.[6] It currently has sixty-six parties, but these do not include many important military powers including China, India, Israel, North Korea, Pakistan, Russia, South Korea, and the United States.[7]

[8] *Id.* (footnotes omitted).

[1] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 UNTS 137, 19 ILM 1523 (1980).

[2] For information on the CCW and its protocols, see http://www.unog.ch/80256EE600585943/(httpPages)/4F0DEF093B4860B4C1257180004B1B30?OpenDocument.

[3] John R. Crook, Contemporary Practice of the United States, 101 AJIL 478, 501, 502 (2007).

[4] John R. Crook, Contemporary Practice of the United States, 102 AJIL 860, 889 (2008).

[5] For the text of the Oslo Convention and related information, see http://www.clusterconvention.org/.

[6] While the Oslo Convention is often described as banning possession and use of cluster munitions, its Article 2(c) defines cluster munitions to exclude certain advanced weapons that incorporate small numbers of submunitions.

[7] Crook, *supra* note 3, at 503.

The International Committee of the Red Cross[8] and other organizations and groups supporting a complete ban on cluster munitions also opposed the new protocol. The director of the arms division of Human Rights Watch savaged the U.S. position.

> Regrettably, the move to eliminate cluster munitions is under attack, with the United States leading the way. The US is touting a much weaker alternative through the Convention on Conventional Weapons (CCW)—an alternative with much lower standards than US policy already requires.
>
> At a conference in Geneva beginning November 14, diplomats will try to conclude negotiations on a new CCW protocol on cluster munitions. Though cloaked in humanitarian rhetoric, the draft is clearly an effort to provide political and legal cover for potential future use of the weapon. That is bad news because cluster munitions are indiscriminate when they are used, causing harm well beyond the target, and leaving unexploded submunitions to threaten civilians long afterward.[9]

The U.S. delegation countered that the proposed CCW protocol stood a chance of adoption by important states with significant stockpiles that are not likely ever to accept the Oslo Convention, resulting in the elimination of many weapons otherwise remaining in national arsenals. In a November 2011 telephonic press conference prior to the vote on the proposed protocol, Department of State Legal Adviser Harold Koh and Deputy Assistant Secretary of Defense Bill Leitzau explained the U.S. position. An excerpt follows:

> MR. KOH: . . . We wanted to dispel at the outset the notion that in some way we are trying to detract from the Oslo Convention, which is a separate treaty outside the framework of the CCW, which also addresses clusters. We see the two as complementary, not as competitive. Nothing that we are saying or supporting would diminish or detract from the Oslo Convention, and we think that the protocol that's under consideration here takes a significant step toward a goal that everybody shares, which is to address comprehensively the humanitarian impact of cluster munitions.
>
> Just to make this concrete, many countries in the world are not parties to Oslo and are unlikely to become so, and . . . they represent 85 to 90 percent of the world's cluster munition stockpiles. So a question then becomes: How do you regulate that 85 to 90 percent holders if they're never going to join the Oslo Convention? And the obvious answer is to try to bring regulation into the CCW, where they do participate.
>
> Under discussion right now is a ban on cluster munitions that are produced before 1980. If that were adopted as part of this protocol upon ratification and entry into force, it would immediately prohibit over 2 million cluster munitions or more than 100 million submunitions, which is about one-third of the entire U.S. stockpile of cluster munitions. To put it directly, if this rule is adopted, it would prohibit more cluster munitions for the United States alone, than the Oslo Convention has prohibited for all of its member states combined. And we think that this is a very significant humanitarian impact and should be supported. It's true for other countries as well. For example, Ukraine announced that if this

[8] Statement by Jakob Kellenberger, President of the International Committee of the Red Cross. Fourth Review Conference of the States Parties to the Convention on Certain Conventional Weapons (CCW), 14–25 November 2011, Geneva, Switzerland (Nov. 15, 2011), *at* http://www.icrc.org/eng/resources/documents/statement/ccw-statement-2011-11-15.htm.

[9] Steve Goose, *The United States Aims Low on Cluster Munitions*, HUFFINGTON POST, Nov. 15, 2011, *at* http://www.huffingtonpost.com/steve-goose/the-united-states-aims-lo_b_1094448.html.

> rule were adopted, it would prohibit more than a third of their existing stocks, almost 700,000 tons. Millions of the Russians' munitions would be banned as well. So, we think that this protocol would have an immediate and tangible humanitarian effect.
>
> The two other advantages of adopting this protocol are that it would create a detailed set of rules about clusters, including obligations with regard to transparency, cooperation, clearance, assistance to victims, and technological assistance. And a third advantage is that the draft protocol is designed to evolve and grow stronger. There are a very detailed set of technical annexes that would adapt to technical developments that might occur with regard to these kinds of munitions, and as well as commitments to review the annexes and to get more comprehensive provisions over time.[10]

Opponents of the new protocol blocked its adoption in the conference's final hours.[11] Some diplomatic observers believe this outcome damages the credibility of the United Nations as a forum for future disarmament negotiations.[12] The United States Mission in Geneva issued a statement expressing disappointment at the outcome.

> The United States is deeply disappointed by the failure of the Fourth Review Conference of the Convention on Certain Conventional Weapons (CCW) to conclude a protocol on cluster munitions.
>
> The past four years of negotiations in the CCW offered a rare opportunity to place the major users and producers of cluster munitions, who represent between 85 and 90 percent of the world's stockpiles, under a legally binding set of prohibitions and restrictions regarding cluster munitions for the first time. The protocol would have led to the immediate prohibition of many millions of cluster munitions; placed the remaining cluster munitions under a detailed set of restrictions and regulations; and subjected member states to a detailed list of additional obligations on issues such as clearance, transparency and destruction, all of which would have led to a substantial humanitarian impact on the ground.
>
> In fact, the protocol would have prohibited a greater number of cluster munitions for the United States alone than the Oslo Convention has prohibited for all of its member states combined.
>
> In the wake of this outcome, the United States will continue to implement its own voluntary policy to prohibit by 2018 the use of cluster munitions with more than a one percent unexploded ordnance rate, and we encourage other countries to take similar steps. The United States will also continue to serve as a world leader in addressing the humanitarian impact of cluster munitions and other explosive remnants. Since 1993, the United States has provided more than $1.9 billion to mitigate the threat from explosive remnants of war and other conventional weapons destruction in 81 countries.[13]

[10] U.S. Dep't of State Press Release No. 2011/1946, CCW Protocol on Cluster Munitions Would Have Immediate and Tangible Humanitarian Effect (Nov. 16, 2011), *at* http://geneva.usmission.gov/2011/11/17/ccw-protocol-2/.

[11] Nick Cumming-Bruce, *Switzerland: Munitions Treaty Fails*, N.Y. TIMES, Nov. 26, 2011, at A8.

[12] *Id.*

[13] U.S. Mission to the United Nations in Geneva Press Release, U.S. Deeply Disappointed by CCW's Failure to Conclude Protocol on Cluster Munitions, Statement of the United States of America on the Outcome of the Fourth Review Conference of the CCW (Nov. 25, 2011), *at* http://geneva.usmission.gov/2011/11/25/u-s-deeply-disappointed-by-ccws-failure-to-conclude-procotol-on-cluster-munitions/.

SETTLEMENT OF DISPUTES

Second Circuit Refuses to Confirm International Arbitration Award Against Peru, Citing Forum Non Conveniens

In an unusual December 2011 decision, a sharply divided panel of the U.S. Court of Appeals for the Second Circuit directed dismissal on *forum non conveniens* (FNC) grounds of an action under the Inter-American Convention on International Commercial Arbitration (Panama Convention)[1] to confirm an international arbitration award against Peru.[2] The decision has sparked controversy in the international arbitration community.

The majority in *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Peru* (Judges Jon Newman and Ralph Winter, with Judge Gerald Lynch dissenting) directed the district court to grant Peru's motion to dismiss the action. In an opinion by Judge Newman, the panel concluded that a Peruvian statute limiting the amount of money a government agency may pay annually to satisfy a judgment to three percent of its budget[3] was a public interest factor that precluded confirming the award.

The appellee, a Brazilian engineering firm, contracted to prepare engineering studies on water and sewage services in Peru. The contract included a clause authorizing arbitration. After a fee dispute arose, the contractor initiated arbitration in Peru and received an award of over $21 million. The Peruvian government party unsuccessfully challenged the award in the court of appeals in Lima. In January 2008, the Brazilian contractor brought an action under the U.S. Federal Arbitration Act[4] and the Panama Convention seeking confirmation of the award to allow enforcement against proceeds from the sale of Peru's government bonds located in New York.

In 2009, the district court denied Peru's motion to dismiss the action seeking confirmation,[5] and Peru brought an interlocutory appeal. The court of appeals reversed. It first concluded that the district court erred in finding that Peru's courts were an inadequate forum because only U.S. courts could enforce against the funds targeted for enforcement.

> It is no doubt true that only a United States court may attach a defendant's particular assets located here, but that circumstance cannot render a foreign forum inadequate. If it could, every suit having the ultimate objective of executing upon assets located in this country could never be dismissed because of FNC.[6]

The court saw Peru's statutory cap on payments by state agencies as a compelling policy factor that rendered the Southern District of New York an inappropriate forum for enforcing the award.

[1] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 ILM 336 (1975), *available at* http://www.oas.org/juridico/english/treaties/b-35.html.

[2] Figueiredo Ferraz E Engenharia De Projeto Ltda. v. Peru, 665 F.3d 384 (2d Cir. 2011).

[3] The operation of the Peruvian statute was not clear from the record, and the court did not purport to state it precisely.

[4] 9 U.S.C. §§1–16 (2006).

[5] Consultoria E Engenharia de Projeto Ltda. v. Republic of Peru, 655 F.Supp.2d 361 (S.D.N.Y. 2009).

[6] *Figueiredo Ferraz*, 665 F.3d at 390. The dissent (and some outside observers) found this position unpersuasive, believing that *forum non conveniens* should not be available to contest an action intended to gain enforcement of an arbitral award against the losing party's assets in the jurisdiction.

> The parties recognize that public interest factors are to be considered in determining whether an FNC dismissal is appropriate. . . . The Appellants contend that the cap statute is a relevant, perhaps decisive, public factor to be weighed in the discretionary FNC decision. The Appellee responds that the cap statute cannot warrant FNC dismissal because "such laws are contrary to the United States' public policy in favor of international arbitration.". . .
>
> . . . .
>
> We agree with the Appellants that the cap statute is a highly significant public factor warranting FNC dismissal. Although it obviously has special significance for one of the parties in this litigation, Peru, and to that extent differs from public factors such as court congestion, *see Gilbert*, 330 U.S. at 508, which are independent of particular litigants, there is nonetheless a public interest in assuring respect for a sovereign nation's attempt to limit the rate at which its funds are spent to satisfy judgments.
>
> In the somewhat similar context of abstention, the Supreme Court has observed that deferring to litigation in another jurisdiction is appropriate where the litigation is "intimately involved with sovereign prerogative" and it is important to ascertain the meaning of another jurisdiction's statute "from the only tribunal empowered to speak definitively." *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28–29 (1959). The rate at which public funds may be disbursed to satisfy public obligations is surely "intimately involved with sovereign prerogative" and the Peruvian courts are "the only tribunal[s] empowered to speak authoritatively" on the meaning and operation of the cap statute.
>
> . . . .
>
> With the underlying claim arising (1) from a contract executed in Peru (2) by a corporation then claiming to be a Peruvian domiciliary (3) against an entity that appears to be an instrumentality of the Peruvian government, (4) with respect to work to be done in Peru, the public factor of permitting Peru to apply its cap statute to the disbursement of governmental funds to satisfy the Award tips the FNC balance decisively against the exercise of jurisdiction in the United States.[7]

The court concluded that the general U.S. policy of favoring arbitration and the enforcement of international arbitral awards as reflected in the Panama Convention must give way to Peru's policies reflected in its three percent payment cap.

> Although enforcement of such awards is normally a favored policy of the United States and is specifically contemplated by the Panama Convention, that general policy must give way to the significant public factor of Peru's cap statute. Moreover, Article 4 of the Convention explicitly provides that execution of international arbitration awards "may be ordered . . . in accordance with the procedural laws of the country where it is to be executed . . . ," and FNC is a doctrine "of procedure."[8]

Judge Lynch entered a substantial dissent, described by majority as "well-argued" that triggered an extensive footnote of surrebuttal.[9] Judge Lynch took particular exception to the majority's view that Peru's three percent cap on payments compelled dismissal, notwithstanding U.S. treaty obligations to enforce foreign arbitral awards under the Panama Convention.

[7] *Id.* at 391 (citations and footnotes omitted).
[8] *Id.* at 392 (citations omitted).
[9] *Id.* at 394 n. 11.

> By acceding to the [Panama Convention], . . . our country has committed itself to open our courts to the enforcement of international arbitral awards as if they were foreign judicial judgments. This commitment requires us to recognize and enforce international arbitral awards in the vast majority of cases. Today, however, the majority concludes that this commitment may be trumped by a Peruvian statute limiting the portion of its annual budget that an entity of the state may pay towards the satisfaction of a lawfully obtained arbitration award. Neither the majority nor any party argues that this foreign statute operates on our soil of its own force. Nor could they; it is well established that, with few exceptions, none of which are relevant here, forum law governs the enforcement of foreign judgments, even when resolution of the underlying dispute turned on the law of another jurisdiction.
>
> . . . .
>
> . . . The value of international arbitration, especially in contracts involving sovereign states, is that it provides a mechanism by which commercial actors may avoid the "home court advantage" of proceeding in the courts of an adversary state. But this advantage is negated if a party may obtain an independent adjudication on the merits, but is prevented from enforcing any award it obtains anywhere but in the courts of the very country that is to pay the award.
>
> . . . .
>
> [T]he Court holds today, apparently for the first time in its history, that the district court's decision to retain jurisdiction over the case "cannot be located within the range of permissible decisions," *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001). It reaches this result by way of logic that is unprecedented and, I believe, specifically foreclosed by controlling Supreme Court law. Despite recognizing (as do the parties) that Peru's three-percent judgment cap does not apply here as a matter of choice of law, the majority nevertheless concludes that the cap *should* apply to this proceeding and that its inapplicability here renders the United States an inconvenient forum. As a result, the plaintiff is left to seek its remedy in the Peruvian courts—the very forum it entered arbitration to avoid—where the cap undisputedly will apply. The majority . . . achieves this result by a sleight of hand: asserting that although, in the normal course, forum non conveniens is self-consciously blind to how dismissal will affect the substantive law that governs the case, when one of the parties is a sovereign, substantive legal issues may be transformed into public interest factors and considered in the analysis.
>
> . . . [T]he doctrine of forum non conveniens is properly a neutral procedural rule that selects a forum based on convenience, not a device for steering parties to the forum that is likely to apply the substantive law that one or the other of them favors (or that judges in the forum court think is desirable).[10]

D.C. Circuit Vacates Investment Arbitration Award Against Argentina

In January 2012, the U.S. Court of Appeals for the D.C. Circuit took the unusual step of vacating an award against Argentina rendered by an arbitral tribunal constituted under the Argentina–United Kingdom bilateral investment treaty (BIT). In *Republic of Argentina v. BG Group PLC*,[1] the D.C. Circuit concluded that the tribunal acted contrary to the BIT parties' intentions by allowing the claimant to bring the arbitration without first seeking redress in Argentina's courts as required by Article 8(2) of the BIT.

[10] *Id.* at 394, 402–03 (Lynch, J., dissenting) (citations omitted).

[1] 665 F.3d 1363 (D.C. Cir, Jan. 17, 2012).

The case grows out of an investment dispute between Argentina and a British firm that invested in a gas transportation and distribution concern that held a thirty-five-year exclusive license to distribute gas in Buenos Aires and nearby areas. The claimant alleged that measures adopted by Argentina in response to its 2001–02 economic crisis resulted in the expropriation of its investment.

As paraphrased by the court, Article 8(2) of the BIT requires that "disputes between an investor and the host State will be resolved in the host State's courts. If, however, no final court ruling is forthcoming within eighteen months or the dispute is unresolved after a court ruling, the Treaty provides that resort may then be had to arbitration."[2] In the arbitration, the clamant argued, and the tribunal agreed, that Argentina's emergency measures restricted the claimant's access to Argentina's courts and to a renegotiation process so that application of Article 8(2) would produce an unacceptable outcome.[3] The court explained that

> the Panel concluded that although BG Group did not seek recourse in Argentine courts for the eighteen month period required by Article 8(2) of the Treaty, that provision could not, "[a]s a matter of Treaty interpretation . . . be construed as an absolute impediment to arbitration." Final Award ¶147. Citing Article 32 of the Vienna Convention, the Panel concluded that because Argentina by emergency decrees had restricted access to its courts and had excluded from the renegotiation process any licensee that sought redress, a literal reading of the Treaty would produce an "absurd and unreasonable result."[4]

In 2007, the arbitrators ruled for the claimant, finding that Argentina violated its BIT obligation to accord fair and equitable treatment to the investor. The panel awarded the claimant over $185 million plus interest, costs, and attorneys' fees.

The arbitration was seated in Washington, D.C., so the U.S. District Court for the District of Columbia had jurisdiction under the U.S. Federal Arbitration Act (FAA) to hear Argentina's action to set aside the award.[5] The district court ruled for the investor, dismissing Argentina's action to vacate and granting the investor's motion to confirm the award.[6] In an opinion by Judge Judith Rogers, the court of appeals disagreed and reversed.

> Although the scope of judicial review of the substance of arbitral awards is exceedingly narrow, it is well settled that an arbitrator cannot ignore the intent of the contracting parties. Where, as here, the result of the arbitral award was to ignore the terms of the Treaty and shift the risk that the Argentine courts might not resolve BG Group's claim within eighteen months pursuant to Article 8(2) of the Treaty, the arbitral panel rendered a decision wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration. Accordingly, we reverse the orders denying the motion to vacate and granting the cross-motion to confirm, and we vacate the Final Award.[7]

[2] *Id.* at 1365.

[3] *Id.* at 1368.

[4] *Id.* at 1367–68.

[5] Section 10(a)(4) of the Federal Arbitration Act, 9 U.S.C. §10(a), provides that an arbitration award may be vacated "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

[6] Republic of Argentina v. BG Group PLC, 715 F.Supp.2d 108 (D.D.C. 2010); Republic of Argentina v. BG Group PLC, 764 F.Supp.2d 21 (D.D.C. 2011).

[7] *BG Group*, 665 F.3d at 1365–66 (footnote omitted).

Much of the court's opinion addresses whether the arbitrators or reviewing courts should decide the question of "arbitrability," which the court understood to mean whether the arbitrators could hear the case if the requirements of Article 8 were not met.

> The "gateway" question in this appeal is arbitrability: when the United Kingdom and Argentina executed the Treaty, did they, as contracting parties, intend that an investor under the Treaty could seek arbitration without first fulfilling Article 8(1)'s requirement that recourse initially be sought in a court of the contracting party where the investment was made? That question raises the antecedent question of whether the contracting parties intended the answer to be provided by a court or an arbitrator.[8]

The court applied U.S. Supreme Court and other precedents indicating that courts should decide issues of arbitrability absent "clear and unmistakable evidence that the parties intended for the arbitrator to decide the question of arbitrability."[9] It found no such evidence in the Argentina-UK BIT. The court acknowledged that the UNCITRAL arbitration rules (which applied in the arbitration) give arbitrators the power to rule on questions of arbitrability,[10] but it concluded that those rules applied only after an arbitration was properly initiated. "But the Treaty's incorporation of the UNCITRAL Rules has a temporal limitation: the Rules are not triggered until after an investor has first, pursuant to Article 8(1) and (2), sought recourse, for eighteen months, in a court of the contracting party where the investment was made."[11]

> Because the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded, we hold that the question of arbitrability is an independent question of law for the court to decide. . . . The district court therefore erred as a matter of law by failing to determine whether there was clear and unmistakable evidence that the contracting parties intended the arbitrator to decide arbitrability where BG Group disregarded the requirements of Article 8(1) and (2) of the Treaty to initially seek resolution of its dispute with Argentina in an Argentine court.[12]

Unlike the arbitrators and the district court, the court of appeals had no doubt that the claimant's failure to comply with Article 8(2) rendered its claims nonarbitrable.

> Accordingly, "[b]ecause we conclude that there can be only one possible outcome on the [arbitrability question] before us," namely, that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration pursuant to Article 8(3) if the dispute remained, we reverse the orders denying the motion to vacate and granting the cross-motion to confirm the Final Award, and we vacate the Final Award.[13]

[8] *Id.* at 1369.
[9] *Id.* at 1370.
[10] *See* Republic of Ecuador v. Chevron Corp., 638 F.3d 384 (2d Cir. 2011).
[11] *BG Group*, 665 F.3d at 1371.
[12] *Id.* at 1371–72 (citation omitted).
[13] *Id.* at 1373 (citation omitted).

BRIEF NOTES

Final Marine Defendant in Haditha Deaths Pleads Guilty to Lesser Charge, Receives Light Sentence

In the final court-martial proceeding growing out of the deaths of twenty-four Iraqi civilians in Haditha, Iraq, in November 2005, Staff Sergeant Frank Wuterich, leader of the squad involved in the killings, agreed to plead guilty to a single charge of dereliction of duty. Pursuant to his plea agreement, Wuterich was reduced in rank to private and discharged from the Marine Corps. Wuterich faced with multiple charges, including nine counts of involuntary manslaughter.[1]

Wuterich was one of eight marines charged with serious offenses under the Uniform Code of Military Justice in connection with the civilian deaths in Haditha.[2] Charges against a lieutenant colonel,[3] a captain, and four enlisted marines were dropped, and a marine lieutenant was acquitted at trial.[4]

Wuterich's plea bargain and light sentence were condemned by relatives of the victims and by senior officials in Iraq.[5] For many Iraqis, the civilian deaths in Haditha became a symbol of excessive use of force by U.S. military personnel and security contractors. This series of events contributed to Iraq's refusal to allow immunity from local jurisdiction for U.S. military personnel, leading to U.S. forces' withdrawal at the end of 2011.[6]

Secretary of State Clinton Reaffirms U.S. Support for Law of the Sea Convention

In a statement to the Pew Business Roundtable in mid-December 2011, Secretary of State Hillary Rodham Clinton reaffirmed U.S. support for the Law of the Sea Convention. Her statement follows:

> I am delighted to have this opportunity to speak to this roundtable and once again voice my support for joining the Law of the Sea Convention. Signing onto the Convention is critical to protecting American security and enhancing our economic strength.
>
> Joining the Convention would put America's resource rights on firm legal footing, protecting American business interests and helping those businesses stay competitive internationally. The Convention provides legal certainty and predictability that businesses can rely on, empowering them to pursue ventures that they would not be able to undertake otherwise.

[1] *Prosecutor Says Marine Lost Control in Haditha Massacre*, WASH. POST, Jan. 10, 2012, at A9.

[2] John R. Crook, Contemporary Practice of the United States, 100 AJIL 690, 713 (2006); 100 AJIL 918, 950 (2006); 101 AJIL 185, 215 (2007); 101 AJIL 478, 494 (2007); 101 AJIL 636, 663 (2007); 101 AJIL 866, 893 (2007).

[3] John R. Crook, Contemporary Practice of the United States, 103 AJIL 325, 358 (2009).

[4] *Id.*

[5] Michael S. Schmidt, *Anger in Iraq After Plea Bargain over 2005 Massacre*, N.Y. TIMES, Jan. 25, 2012, at A9; Aseel Kami, *Iraq Says to Take Legal Action for Haditha Victims*, REUTERS, Jan. 26, 2012, *at* http://www.reuters.com/article/2012/01/26/us-iraq-massacre-idUSTRE80P1JA20120126.

[6] Liz Sly, *Slain Civilians Taint U.S. Legacy in Iraq*, WASH. POST, Dec. 11, 2011, at A1; John R. Crook, Contemporary Practice of the United States, 106 AJIL 138, 139 (2012).

> For example, Chinese, Indian, and Russian companies are exploring deep seabeds for rare earth elements and valuable metals, but the United States cannot sponsor our companies to do the same. Joining the Convention will level the playing field for American companies so they have the same rights and opportunities as their competitors.
>
> Past administrations—both Republican and Democratic—the United States military, and industry and environmental groups have all together signaled strong support for joining the Convention. It is a key piece of unfinished business. And I'm confident that the United States will soon do what over 160 other countries have already done and join the Law of the Sea Convention. Thanks to all of you for helping to make this a reality.[7]

U.S. Position on the Falkland/Malvinas Islands Dispute

Robert D. Hodgson, former Department of State geographer and a noted expert on maritime boundaries, formulated (only partially tongue in cheek) what came to be known in the Office of the Legal Adviser as Hodgson's Law: "that where there is jurisdictional uncertainty, there is oil."

Further illustrating this principle's predictive power, international oil companies increasingly view areas in the waters around the Falkland/Malvinas Islands as top prospects for offshore oil exploration; exploratory drilling is expected to begin soon.[8] This possibility threatens increased tension between the United Kingdom and Argentina, which dispute sovereignty over the islands and went to war in 1982 following the islands' seizure by Argentine military forces. In recent weeks, Argentine and British officials have exchanged strongly worded statements in the United Nations and other fora.[9]

In response to a press inquiry, the U.S. Department of State in January 2012 posted a brief statement on the U.S. position on the dispute.

> QUESTION: Does the U.S. take a position on the recent posturing between the United Kingdom and Argentina over the Falklands?
>
> ANSWER: This is a bilateral issue that needs to be worked out directly between the governments of Argentina and the United Kingdom. We encourage both parties to resolve their differences through dialogue in normal diplomatic channels.

[7] U.S. Dep't of State Press Release, Video Remarks to Pew Business Roundtable on Law of the Sea Convention (Dec. 16, 2011), *at* http://www.state.gov/secretary/rm/2011/12/178603.htm.

[8] Brian Swint, *Oil Grab in Falkland Islands Seen Tripling U.K. Reserves: Energy*, BLOOMBERG NEWS, Jan. 19, 1012, *at* http://mobile.bloomberg.com/news/2012-01-19/britain-s-oil-grab-in-falkland-islands-seen-tripling-u-k-reserves-energy; John F. Burns, *Prince's Posting in Falklands Revives Ire Before Anniversary*, N.Y. TIMES, Feb. 1, 2012, at A4.

[9] *Compare* United Nations Press Release, Press Conference by the Minister for Foreign Affairs of Argentina (Feb. 10, 2012), *at* http://www.un.org/News/briefings/docs/2012/120210_Argentina.doc.htm ("Citing reports of a Vanguard nuclear submarine stationed in the region, he said the British Government had refused to confirm or deny them. If it was in the vicinity, it would not be the first time, he added, recalling that, in 2003, Argentina had received intelligence information about spilled nuclear materials in the Malvinas (Falklands). He noted that the United Kingdom had signed on, with a reservation, to a treaty on a nuclear-weapon-free zone in Latin America. However, it was apparently not in compliance with that instrument, unlike all the other signatories, he said."), *with* United Nations Press Release, Press Conference by Permanent Representative of the United Kingdom (Feb. 10, 2012), *at* http://www.un.org/News/briefings/docs/2012/120210_UK.doc.htm ("Argentina's allegations that the United Kingdom was deliberately increasing its military presence in the South Atlantic was 'manifestly absurd,' Mark Lyall Grant, the latter country's Permanent Representative to the United Nations, said at a Headquarters press conference today.").

> We recognize de facto United Kingdom administration of the islands but take no position regarding sovereignty.[10]

United States and Russia Conduct Joint Inspection in Antarctica

In January 2012, U.S. and Russian personnel conducted a joint inspection of three other countries' stations, installations, and equipment in Antarctica pursuant to the Antarctic Treaty and its Environmental Protocol. The text of a U.S. Department of State press release on the inspection follows:

> A joint team from the United States and the Russian Federation concluded a six-day inspection of foreign research stations, installations and equipment in Antarctica on January 28, 2012, pursuant to the Antarctic Treaty of 1959 and its Environmental Protocol. The team inspected the following stations: Concordia (France/Italy), Mario Zucchelli (Italy) and Scott Base (New Zealand).
>
> Officials from the U.S. Department of State and the Russian Federation Ministry of Foreign Affairs led the inspection.
>
> The U.S.-Russia team examined the Treaty Parties' adherence to their obligations, including with respect to limiting environmental impacts, ensuring that Antarctica is used only for peaceful purposes and that Parties honor the prohibition on measures of a military nature.
>
> The United States appreciates the assistance provided by the French, Italian and New Zealand personnel at the visited stations.
>
> An inspection report will be jointly presented by the United States and Russia to the other Treaty Parties at the next Antarctic Treaty Consultative Meeting, to be held in Hobart, Australia, in June 2012.
>
> For further information on the Antarctic Treaty, visit http://www.state.gov/e/oes/ocns/opa/c6528.htm.[11]

Korean, Japanese Business Executives to Serve U.S. Prison Time for Antitrust Violations Committed Abroad

In two recent cases, executives of foreign companies implicated in criminal violations of U.S. antitrust laws have pleaded guilty to criminal charges and have been sentenced to imprisonment in U.S. federal prison.

In December 2011, the U.S. Department of Justice announced that three executives of a Korean disk drive producer have agreed to plead guilty to criminal violations of the U.S. antitrust laws in connection with multiple conspiracies to fix prices and rig bids on optical disk drives sold to U.S. manufacturers. The anticompetitive behavior allegedly included meetings in Taiwan and Korea and much other conduct outside of the United States. Excerpts from the Department's announcement follow:

[10] U.S. Dep't of State Press Release No 2012/087, U.S. Position on the Falkland (Malvinas) Islands (Jan. 20, 2012), *at* http://www.state.gov/r/pa/prs/ps/2012/01/182294.htm.

[11] U.S. Dep't of State Press Release No. 2012/143, United States and Russian Federation Conclude Joint Inspection in Antarctica (Jan. 30, 2012), *at* http://www.state.gov/r/pa/prs/ps/2012/01/182701.htm.

> WASHINGTON—Three Korean Hitachi-LG Data Storage Inc. (HLDS) executives have agreed to plead guilty and to serve prison time in the United States for their participation in a series of conspiracies to rig bids and fix prices for the sale of optical disk drives, the Department of Justice announced today.
>
> According to the felony charges filed today in U.S. District Court in San Francisco, Young Keun Park, Sang Hun Kim and Sik Hur, aka Daniel Hur, conspired with co-conspirators to suppress and eliminate competition by rigging bids for optical disk drives sold to Dell Inc. and Hewlett-Packard Company (HP) and/or fixing prices for optical disk drives sold to Microsoft Corporation. The three HLDS executives participated in the conspiracies at various times between approximately November 2005 and September 2009. Under the plea agreement, Park and Kim each have agreed to serve eight months in prison and Hur has agreed to serve seven months in prison.
>
> . . . .
>
> According to the court documents, Dell hosted optical disk drive procurement events in which bidders would be awarded varying amounts of optical disk drive supply depending on where their pricing ranked. From approximately February 2009 to September 2009, Park and Kim participated in a series of conspiracies involving meetings and conversations with co-conspirators to discuss bidding strategies and prices of optical disk drives. As part of the conspiracies, Park, Kim and co-conspirators submitted bids at collusive and non-competitive prices and exchanged information on sales, market share and the pricing of optical disk drives to monitor and enforce adherence to the agreements.
>
> The department said that from approximately June 2007 to March 2008, Park and co-conspirators participated in a conspiracy involving meetings and conversations in Taiwan and the Republic of Korea to discuss and to fix the prices of optical disk drives sold to Microsoft. As part of the conspiracy, Park and co-conspirators also exchanged information on the sales of optical disk drives to monitor and enforce adherence to the agreed-upon prices.[12]

In a second case, the U.S. Department of Justice announced in January 2012 that two Japanese suppliers of automotive electrical components and four of their executives had agreed to plead guilty to serious antitrust violations and that the four executives would serve time in U.S. prisons. An excerpt from the department's announcement follows:

> WASHINGTON—Two Japanese suppliers of automotive electrical components—Yazaki Corporation and DENSO Corporation—have agreed to plead guilty and to pay a total of $548 million in criminal fines for their involvement in multiple price-fixing and bid-rigging conspiracies in the sale of parts to automobile manufacturers in the United States, the Department of Justice today announced. Four executives, all Japanese nationals, have also agreed to plead guilty and to serve prison time in the United States.
>
> Yazaki has agreed to pay a $470 million criminal fine—the second largest criminal fine obtained for a Sherman Act antitrust violation—and DENSO has agreed to pay a $78 million criminal fine. The four executives from Yazaki—Tsuneaki Hanamura, Ryoji Kawai, Shigeru Ogawa and Hisamitsu Takada—will serve prison time ranging from 15 months to two years. The two-year sentences would be the longest term of imprisonment imposed

[12] U.S. Dep't of Justice Press Release No. 11-1630, Three Hitachi-LG Data Storage Executives Agree to Plead Guilty for Participating in Bid-Rigging and Price-Fixing Conspiracies Involving Optical Disk Drives (Dec. 13, 2011), *at* http://www.justice.gov/opa/pr/2011/December/11-at-1630.html.

on a foreign national voluntarily submitting to U.S. jurisdiction for a Sherman Act antitrust violation. The fine amount and prison sentences are subject to court approval.[13]

Official Digest of U.S. Practice in International Law for 2010 Now Available

In late December 2011, the U.S. Department of State announced the publication, in both electronic and printed form, of the 2010 volume of the Department's *Digest of United States Practice in International Law.* The Department's announcement follows:

> The Department of State is pleased to announce the forthcoming publication of the 2010 *Digest of United States Practice in International Law*, covering developments during 2010. This edition of the *Digest* is available electronically on the State Department's website (*www.state.gov/s/l/c8183.htm*) and will be available in print on December 30, 2011.
>
> The *Digest* traces its history back to an 1877 treatise by John Cadwalader, which was followed by multivolume encyclopedias covering selected areas of international law. The *Digest* later came to be known to many as "Whiteman's" after Marjorie Whiteman, the editor from 1963–1971. Beginning in 1973, the Office of the Legal Adviser published the *Digest* on an annual basis, changing its focus to documentation current to the year. Although publication was temporarily suspended after 1988, the office resumed publication in 2000 and has since produced volumes covering 1989 through 2010. A cumulative index covering 1989–2006 was published in 2007, and an updated edition of that index, covering 1989–2008, was published in 2010.
>
> The *Digest*, edited by the Office of the Legal Adviser, is co-published by Oxford University Press and the International Law Institute. Annual volumes of the Digest for the years 2004–2010 and the updated cumulative index can be purchased from Oxford University Press Order Department, 2001 Evans Road, Cary, NC 27513, 1-800-445-9714 (phone), 1-919-677-1303 (fax), *custserv@oup-usa.org.* Volumes covering 1989 through 2003 can be purchased from the International Law Institute, The Foundry Building, 1055 Thomas Jefferson St. NW, Washington, D.C. 20007; contact William Mays, Publications Department, 1-202-247-6006 (phone), 1-202-247-6010 (fax).[14]

[13] U.S. Dep't of Justice Press Release, Yazaki Corp., Denso Corp. and Four Yazaki Executives Agree to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracies (Jan. 30, 2012), *at* http://www.justice.gov/opa/pr/2012/January/12-at-128.html.

[14] U.S. Dep't of State Press Release No. 2011/2181, Department of State Announces Publication of 2010 Digest of United States Practice in International Law (Dec. 21, 2011), *at* http://www.state.gov/r/pa/prs/ps/2011/12/179381.htm.